: 6750-01-P]

FEDERAL TRADE COMMISSION

[File No. 211 0087]

ARKO/GPM Investments; Analysis of Agreement Containing Consent Orders to Aid Public Comment

AGENCY: Federal Trade Commission.

ACTION: Proposed consent agreement; request for comment.

SUMMARY: The consent agreement in this matter settles alleged violations of federal law prohibiting unfair methods of competition. The attached Analysis of Proposed Consent Orders to Aid Public Comment describes both the allegations in the complaint and the terms of the consent orders—embodied in the consent agreement—that would settle these allegations.

DATES: Comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: Interested parties may file comments online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Please write: "ARKO/GPM Investments; File No. 211 0087" on your comment and file your comment online at *https://www.regulations.gov* by following the instructions on the web-based form. If you prefer to file your comment on paper, please mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex D), Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Kurt Herrera-Heintz (202-326-3542), Bureau of Competition, Federal Trade Commission, 400 7th Street SW, Washington, DC 20024.

SUPPLEMENTARY INFORMATION: Pursuant to Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and FTC Rule 2.34, 16 CFR 2.34, notice is hereby given that the above-captioned consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of thirty (30) days. The following Analysis of Agreement Containing Consent Orders to Aid Public Comment describes the terms of the consent agreement and the allegations in the complaint. An electronic copy of the full text of the consent agreement package can be obtained from the FTC Website at this web address: https://www.ftc.gov/news-events/commission-actions.

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. Write "ARKO/GPM Investments; File No. 211 0087" on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the *https://www.regulations.gov* website.

Due to protective actions in response to the COVID-19 pandemic and the agency's heightened security screening, postal mail addressed to the Commission will be delayed. We strongly encourage you to submit your comments online through the *https://www.regulations.gov* website.

If you prefer to file your comment on paper, write "ARKO/GPM Investments; File No. 211 0087" on your comment and on the envelope, and mail your comment to the following address: Federal Trade Commission, Office of the Secretary, 600 Pennsylvania Avenue NW, Suite CC-5610 (Annex D), Washington, DC 20580.

Because your comment will be placed on the publicly accessible website at *https://www.regulations.gov*, you are solely responsible for making sure your comment does not include any sensitive or confidential information. In particular, your comment should not include sensitive personal information, such as your or anyone else's Social Security number; date of birth; driver's license number or other state identification number, or foreign country equivalent; passport number; financial account number; or credit or debit card number. You are also solely responsible for making sure your comment does not include sensitive health information, such as medical records or other individually identifiable health information. In addition, your comment should not include any "trade secret or any commercial or financial information which . . . is privileged or confidential"—as provided by Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2)—including competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

Comments containing material for which confidential treatment is requested must be filed in paper form, must be clearly labeled "Confidential," and must comply with FTC Rule 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c). Your comment will be kept confidential only if the General Counsel grants your request in accordance with the law and the public interest. Once your comment has been posted on *https://www.regulations.gov* – as legally required by FTC Rule 4.9(b) – we cannot redact or remove your comment from that website, unless you submit a confidentiality request that meets the requirements for such treatment under FTC Rule 4.9(c), and the General Counsel grants that request.

Visit the FTC Website at *https://www.ftc.gov* to read this document and the news release describing this matter. The FTC Act and other laws the Commission administers permit the collection of public comments to consider and use in this proceeding, as appropriate. The Commission will consider all timely and responsive public comments it receives on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*]. For information on the Commission's privacy policy, including routine uses permitted by the Privacy Act, see *https://www.ftc.gov/site-information/privacy-policy*.

Analysis of Agreement Containing Consent Orders to Aid Public Comment

I. Introduction

The Federal Trade Commission ("Comhmission") has accepted an Agreement Containing Consent Order ("Consent Agreement") from ARKO Corp., GPM Investments, LLC, GPM Southeast, LLC, and GPM Petroleum, LLC (collectively "Respondents"). The Consent Agreement is designed to remedy the anticompetitive effects that resulted from GPM's acquisition of retail fuel assets from Corrigan Oil Company ("Corrigan").

Pursuant to an Asset Purchase Agreement dated March 8, 2021, GPM Petroleum, LLC, and GPM Southeast, LLC, which are directly controlled by GPM Investments, LLC (collectively "GPM") and indirectly controlled by ARKO Corp., acquired 60 branded Express Stop retail fuel locations in Michigan and Ohio from Corrigan (the "Acquisition"). GPM consummated the Acquisition in May 2021 for total consideration of approximately $94 million. As part of the Asset Purchase Agreement, Corrigan agreed not to compete for a period of time and within a specified radius around approximately 190 GPM owned, operated, and leased locations, in addition to the Express Stop locations purchased by GPM.

The Commission's Complaint alleges that the Acquisition violated Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, by substantially lessening competition for the retail sale of gasoline in five local markets in Michigan, and for the retail sale of diesel fuel in one of those same local markets. The Commission's Complaint also alleges that the noncompete agreements violated Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by unreasonably lessening potential competition for the retail sale of gasoline and diesel fuel within the noncompete territories.

Under the terms of the Decision and Order ("Order") contained in the Consent Agreement, Respondents are required to rescind parts of an Asset Purchase Agreement with Corrigan and release back to Corrigan retail fuel assets in the five local markets in Michigan. Respondents must transfer these assets back to Corrigan no later than the Closing Date listed in the Reacquisition Agreement of June 28, 2022. In addition, the Order resolves concerns raised by the noncompete agreements in the parties' Asset Purchase Agreement.

The Consent Agreement has been placed on the public record for thirty days to solicit comments from interested persons. The Commission issued the accompanying Order as final prior to seeking public comment, as provided in Section 2.34(c) of the Commission's Rules. This will allow the Commission to enforce the Order if there are any violations of its provisions during the public comment period. Comments received during this period will become part of the public record. After thirty days, the Commission will again review the Consent Agreement and comments received and decide whether it should withdraw from the Consent Agreement or modify the accompanying Order as provided in Section 2.34(e) of the Commission's Rules.

II. The Respondents

Respondent ARKO Corp., through its wholly owned subsidiary GPM, operates or supplies stores in thirty-three states and Washington D.C. GPM is the sixth largest convenience store chain in the country, with approximately 3,000 locations comprising approximately 1,400 company-operated stores and 1,625 independent dealer locations.

GPM sells fuel to retail and wholesale customers. GPM earned 2021 revenue over $4.7 billion, with fuel sales accounting for $3 billion.

GPM derives most of its revenue from the retail sale of fuel and products sold in its convenience stores. GPM retains control over the fuel operation at its company-operated stores and sets wholesale fuel prices on a delivered basis to its dealer-operated network.

III. Retail Sale of Gasoline and Diesel Fuel

Relevant product markets in which to analyze the Acquisition are the retail sale of gasoline and the retail sale of diesel fuel. Consumers require gasoline for their gasoline-powered vehicles and can purchase gasoline only at retail fuel outlets. Likewise, consumers require diesel fuel for their diesel-powered vehicles and can purchase diesel fuel only at retail fuel outlets. The retail sale of gasoline and the retail sale of diesel fuel constitute separate relevant markets because the two are not interchangeable. Vehicles that run on gasoline cannot run on diesel fuel, and vehicles that run on diesel fuel cannot run on gasoline.

The Commission alleges that the relevant geographic markets in which to assess the competitive effects of the Acquisition with respect to the retail sale of gasoline are five local markets in and around the following cities: Saginaw, Chesaning, Mt. Morris, and Mason, Michigan. The relevant geographic market in which to analyze the effects of the Acquisition on the retail sale of diesel fuel include one local market in and around one of the Saginaw, Michigan retail gasoline markets.

The geographic markets for retail gasoline and retail diesel fuel are highly localized, depending on the unique circumstances of each area. Each relevant market is distinct and fact-dependent, reflecting many considerations, including commuting patterns, traffic flows, and outlet characteristics. Consumers typically choose between nearby retail fuel outlets with similar characteristics along their planned routes. The geographic markets for the retail sale of diesel fuel are similar to the corresponding geographic markets for retail gasoline, as many diesel fuel consumers exhibit preferences and behaviors similar to those of gasoline consumers.

The Acquisition substantially lessened competition in each of these local markets, resulting in five highly concentrated markets for the retail sale of gasoline and one highly concentrated market for the retail sale of diesel fuel. Retail fuel outlets compete on price, store format, product offerings, and location, and pay close attention to competitors in close proximity, on similar traffic flows, and with similar store characteristics.

In each of the local gasoline and diesel fuel retail markets where the Commission alleges harm, the Acquisition reduced the number of competitively constraining independent market participants around the locations GPM is returning to Corrigan to two or fewer. Absent the Acquisition, Respondents and Corrigan would have continued to compete directly in these local markets. Because of the Acquisition, GPM is likely able to raise prices unilaterally in markets where GPM and Corrigan were close competitors.

Moreover, the Acquisition would enhance the incentives for interdependent behavior in local markets where only two competitively constraining, independent market participants would remain. Two aspects of the retail fuel industry make it vulnerable to such coordination. First, retail fuel outlets post their fuel prices on price signs that are visible from the street, allowing competitors to easily observe each other’s fuel prices. Second, retail fuel outlets regularly track their competitors’ fuel prices and change their own prices in response. These repeated interactions give retail fuel outlets familiarity with how their competitors price and how changing prices affect fuel sales.

The Commission’s Complaint also alleges that, absent the Consent Agreement, the agreement not to compete harms customers in local retail gasoline and retail diesel fuel markets throughout Michigan and Ohio. By prohibiting Corrigan from competing with (1) each acquired retail fuel outlet and (2) a list of specified GPM locations, whether those GPM locations are anywhere near an acquired Corrigan location, the noncompete provision unreasonably restricts potential competition between Corrigan and GPM that would otherwise benefit consumers.

A general desire to be free from competition following a transaction is not a legitimate business interest. First, Corrigan's agreement not to compete with the 190 GPM-identified retail fuel outlets goes well beyond what is reasonably necessary to protect GPM's investment in the 60 acquired retail Express Stop locations. Second, the Corrigan noncompete agreements around the 60 acquired Express Stop stations, based on the unique facts and conditions present in those markets, is unreasonably overbroad in geographic scope and longer than reasonably necessary to protect a legitimate business interest.

Entry into each relevant market would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects arising from the Acquisition. Significant entry barriers include the availability of attractive real estate, the time and cost associated with constructing a new retail fuel outlet, and the time and uncertainty associated with obtaining necessary permits and approvals.

IV. The Consent Agreement

The Order remedies the Acquisition's likely anticompetitive effects by requiring Respondents to return to Corrigan the retail fuel outlets included in the Acquisition in each of the five local markets. Corrigan is an experienced operator of retail fuel sites and remains an active market participant by continuing to operate a retail fuel business and a wholesale fuel supply business in Michigan.

The transfer of assets must be completed no later than the Closing Date listed in the Reacquisition Agreement of June 28, 2022. The Order further requires Respondents to maintain the economic viability, marketability, and competitiveness of each retail fuel business until Corrigan reacquires the five retail fuel locations.

The Order also requires Respondents to obtain prior approval from the Commission before acquiring retail fuel assets within a 3-mile driving distance of any of the returned locations for 10 years. The prior approval provision is necessary because the purchase of a retail fuel business near any of the five retail fuel locations would likely raise the same competitive concerns as the Acquisition and may not be reportable under the Hart-Scott-Rodino Act.

The Order also resolves the competitive concerns raised by the agreements not to compete. The Order requires that Respondents amend the noncompete obligation in the Asset Purchase Agreement to (i) only apply to retail fuel businesses acquired by GPM in this Acquisition, excluding the five locations to be returned to Corrigan, and (ii) limit the noncompete terms relating to each acquired retail fuel business to no broader than 3 years in duration and no more than 3 miles from each Express Stop location. The Order further (1) requires Respondents not enter into or enforce any noncompete agreement related to acquisitions of a retail fuel business that restrict competition around a retail fuel business that GPM already owns or operates, as opposed to the acquired retail fuel business, and (2) to notify third parties subject to similar noncompete agreements of GPM's obligations under the Order.

Retail fuel competition varies based on many factors, including driving patterns, population density, and consumer demand. The reasonableness of agreements not to compete will necessarily differ with local retail fuel competition. A 3-year and 3-mile radius around each acquired location in this transaction resembles a reasonable duration and geographic scope given the local competitive conditions around each Express Stop location. Noncompete agreements affecting areas geographically distinct from acquired retail fuel outlets, and noncompete agreements untethered to protecting goodwill acquired in the acquisition, are highly suspect and warrant Commission scrutiny.

The purpose of this analysis is to facilitate public comment on the Consent Agreement. The Commission does not intend this analysis to constitute an official interpretation of the Consent Agreement or to modify its terms in any way.

By direction of the Commission.

April J. Tabor,

Secretary.

Statement of Chair Lina M. Khan Joined by Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro M. Bedoya

Last year, in an unreportable transaction valued at approximately $94 million, GPM Petroleum, LLC, GPM Southeast, LLC, GPM Investments, LLC, and ARKO Corp. (collectively "GPM") acquired 60 retail gasoline, diesel, and convenience stores from Corrigan Oil Company ("Corrigan"). Today, after a thorough investigation of this deal, the Commission announced an enforcement action alleging that GPM illegally acquired five of those retail fuel stations from Corrigan, and imposed illegitimate, overbroad agreements not to compete in connection with that acquisition. This action marks an important step forward in protecting the public from harm when rivals agree not to compete. Firms proposing mergers should take note that the Commission will scrutinize contract terms in merger agreements that impede fair competition.

Noncompete agreements affect millions of Americans every day, but they come in a variety of forms. Much of the discussion surrounding noncompete clauses in recent years has focused on their inclusion in employment contracts and the resulting harm to workers. Noncompete covenants, however, can also govern businesses that are direct or potential competitors, and sometimes are included in merger agreements. Today's

Commission action highlights that noncompete clauses in a merger agreement may unduly and illegitimately restrain competition when both of the parties remain competitors in other markets.

By its very nature, an agreement not to compete between two businesses reduces competition if it restrains the activities of actual and potential rivals during the term of the agreement. Indeed, noncompete agreements between competing businesses are suspect: for instance, an agreement not to compete may constitute a thinly veiled market allocation scheme, a per se violation of the antitrust laws.

In the context of mergers, parties sometimes assert that noncompete clauses are necessary to protect a legitimate business interest in connection with the sale of a business, such as the goodwill acquired in a transaction. When the seller is exiting the business or selling off assets needed to compete with the buyer, a noncompete that limits prospects for reentry may in certain instances reflect that goodwill, if appropriately limited in geographic scope and duration.

In this matter, as alleged in the Commission's complaint, GPM's agreement to purchase Corrigan's retail fuel stations contained noncompete terms that were overbroad and facially unrelated to protecting any goodwill GPM might hope to acquire with the Corrigan stations. According to the complaint, these noncompete provisions are illegal because they were designed to ensure that GPM would not face direct or indirect competition from Corrigan—not only in the competitively overlapping areas, but even in geographic areas far from the acquired stations.

As today's consent agreement makes clear, firms may not use a merger as an excuse to impose overbroad restrictions on competition or competitors. The Commission will evaluate agreements not to compete in merger agreements with a critical eye.

We look forward to reviewing input and comments from the public about the approach this settlement has taken with respect to the noncompetes at issue here. The

Commission is committed to acting in the public interest, and comments from the public are vital to ensuring that we are successful in doing so.

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